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Massimo Meccarelli

The Assumed Space: Pre-reflective Spatiality and Doctrinal Configurations in Juridical Experience

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Abstract

The purpose of this contribution is to analyse, by means of the legal-historical perspective, the relationship between the pre-reflections of space and the configurations of legal concepts and categories. Three examples of the interplay between doctrinal configurations and the spatial dimension within the context of three different historical periods will be illustrated: *given* space in the Middle Ages, *possible* space in the Modern Age and *decided* space in the Contemporary Age. From this basis, the essay considers the heuristic importance of such an analytical approach – mindful of the profiles of presupposition, such as the space assumption, underlying the conceptualisation of ideas – for a history attentive to the constraints of the theoretical sustainability of legal concepts.

Massimo Meccarelli

The Assumed Space: Pre-reflective Spatiality and Doctrinal Configurations in Juridical Experience

1 Statement of the problem

For legal historians, the question of the relationship between time and law is a constituent of the hermeneutic approach. Less frequently, however, do they include or consider the significance of spatiality within the context of their research. In other words, the problems and issues dealt with rarely examine the relationship obtaining between the legal- and spatial dimensions.

Space is certainly something to be considered in relation to the legal dimension, yet it is usually restricted to its instrumental value: space is regarded as an external profile to be taken into account in order to better refine and improve the analytical approach. The relationship between space and law is employed as a *reconstructive key* to unlock the historical analysis. While the problems this use of spatiality poses from a methodological viewpoint are indeed relevant, I do not wish to deal with such issues in this contribution. Instead, I would like to attempt a different approach; one examining the importance of the spatial dimension *from within* the legal dimension. In other words, it is a question of considering the relationship between space and law as a *constitutive key*.

The point here is not, therefore, the territorial scale that I, as a legal historian, choose for my research, but rather space as an implicit problem or *assumption* within which a legal question takes shape. Here, space is not so much an instrument for my analysis, but a factor of the issue that I intend to analyse on equal footing with other factors within the historical context (social, economic, political, cultural, etc.).

How is the spatial issue inserted into the configuration of a doctrinal approach? What additional information does addressing this question to the sources we wish to study provide? However, before we consider these questions, an even more pressing question needs to be addressed: does it makes sense to ask this question from a legal-historical point of view?

I think it does makes sense; yet, at the same time, I realise that justifying such a working hypothesis is not so straightforward, and that it is not even possible to provide a comprehensive answer to such a complex issue in the space of an article. Instead, what I would like to do in this paper is to identify some paths for possible avenues of investigation. Based on these albeit preliminary elements, I would also like to try and answer the second question I posed about the *quid pluris*, which just might provide us with the relationship between space and law considered in a constitutive key.

My task, then, is as follows: I will illustrate three examples of interplay between doctrinal configurations and the spatial dimension within the context of three different historical periods: the Middle Ages, the Modern Age and the Contemporary Age. From this basis, I will attempt to consider the heuristic importance of such an analytical approach. I do not pretend to outline ideal-types that are representative of each respective historical phase. The purpose of these pages is only to identify, through the legal-historical perspective, some examples, among others, of the relationship between pre-reflection of space and configuration of legal concepts and categories.

2 Given space in the Middle Ages

Within the mediaeval context, the spatiality of law reflects anthropological attitudes marked by naturalism, that is, the idea of the prevalence of the phenomenal given in human actions. An example is represented precisely by the set of rules governing the relationship between human beings and things[1] characterised in a reicentric sense, i. e., in

1 Grossi (1992) 21–122; Grossi (1997) 67–75; Rossi (1996).

the sense of orienting legal protections towards human activities capable of producing an economic and social utility. In fact, it is a question of forms of protection that takes shape starting from the normative force of social facts and, in particular, customary law.[2]

Even the theological and philosophical conceptions – I am thinking here of Thomas Aquinas – situate human beings within a perspective oriented towards *intelligere* as the existing *ordo* of objective reality;[3] it is a question of an *order* of divine creation that can only be understood through its historical manifestations. Within such a framework, we can say that during the Middle Ages, for the world of legal concepts, space seems to have been understood in terms of a *given* space, that is, the element of spatiality is not an element susceptible to the will of human beings. Instead, it is an objective given that reality offers as a factor in determining legal categories.

We have already mentioned reicentrism when it comes to the relationship between individuals and things. As I am using the term, it refers to a reconstructive constraining of space taken from the doctrine connected to the development of the concept of *dominium divisum*. Equally persuasive are the examples drawn from the categories of public law, by means of which legal regimes of the common good (*bonum commune*) were regulated.

In a pioneering essay,[4] Antonio Manuel Hespanha indicated several principles of reference that guided the organisation of political spaces in the late Mediaeval and Modern Ages. In particular, he highlighted the nature of their *unavailability* due to the constraint of social bonds time and tradition had helped establish and consolidate. For this reason, the other guiding principle was that of *miniaturisation*, that is, reticular reduction of political space into small parts. Within such a framework, one of a society constituted by various groups, political space can be thought of only in relation to a territory already necessarily given.

This is not a static representation: mediaeval jurists were well aware of the ongoing instability at the territorial level of political situations and their legal regimes. Nonetheless, their work on conceptualisation was only related to the legitimation of such power processes. In other words, it was a question of recognising, by means of law, the given space in which political change could come about. This meant that law represented the stablised level[5] or manifestation of this structuring power; a force that was inherently flexible and changing over time.[6]

The conceptual development of *potestas statuendi*[7] provides us with a confirmation; this doctrine is configured precisely to coordinate the political autonomy (i. e., the power to give one's own rules) with the regimes of legal autonomy (i. e., a dynamic involved in the production of law based on the availability of social practices of self-organisation possessing a normative force of its own and recognised by jurists thanks to the *interpretatio* of Roman- and canon law as the expression of a common *ordo iuris*).

Another example is the doctrine of territorial boundaries, which, by placing the approach in the wake of the possibilities offered by a comprehensive category, such as *iurisdictio*, acknowledges the importance placed on the effectiveness of power processes.[8]

The *territorium* corresponding to a political space is identified through discernment; it is an exercise of power, but in the form of an *ius dicere*,[9] i. e., an activity that implies recognising (and not creating) spaces. The ordering paradigm of *ius dicere* makes it possible to represent the embodiment of a pluralistic and changing political world within a given territorial fabric while respecting

2 Grossi (1997) 182–189; Grossi (1998) 14–20; Garré (2005) 53–85.

3 Grossi (1997) 82–85, 135–144; Vogliotti (2007) 33–42; Costa (1999) 6–13; Quaglioni (1991).

4 Hespanha (1983), especially 25–29; more recently Hespanha (2013).

5 Grossi (1997) 127–201; Garriga (2010) 62–63.

6 Vallerani (2010); Bordone / Guglielmotti / Lombardini / Torre (2007); Chittolini / Willoweit (1994).

7 Storti (1991); Santarelli (1999).

8 Costa (1969) 223–262; Marchetti (2001) 74–77, 140.

9 For example, Cinus (1758), l. Extra territorium, tit. De Iurisdictione omnium iudicum, n. 5; Baldus (1580), rub. Quae sint regalia, n. 2: »Territorium aliud non est quam terrae spatium munitum et armatum iurisdictione«; Del Monte (1584), c. LXXVIII, n. 1. »ex iurisdictionis exercitio discerni poterit, quantum se extendant territoria«. Or also: »territorium per actus iurisdictionales designatur« (c. VI, n. 10). See Marchetti (2001) 84–86.

the principle of the inalterability of public boundaries (*fines publici minime praescribi possunt*).[10] In this sense, we have to consider given space as the space presupposed by such a legal doctrine.

The approach does not change if we consider universal powers. For example, the concept of *imperium*, in virtue of its connection to the extension of *Respublica christiana*,[11] is not tied to a specific territoriality or limited by certain boundaries, but rather is characterised by relatively mobile borders.

When doctrine states that the *Imperator* is the *dominus mundi*, it is meant to emphasise that the spatiality referring to the process of power traceable to the *Imperator* is the »entire world«, or, to use Pietro Costa's words, its »area of occurrence«. This particular doctrinal construction in the late Middle Ages understands the term *empire* in terms of a »model of language, a system of reference for the interpretation of complex real political situations«.[12] In this way, with respect to given space, it is possible to obtain a complex articulation of regimes of public law moving between the universal and the particular as well as making it possible to recognise multiple political authorities in the territory.

Bartolus da Sassoferrato summarises the idea as follows: »Imperator est dominus totius mundi vere. Nec obstat quod alii sunt domini particulariter, quia totius mundus est universitas quaedam; unde potest quis habere dictam universitatem, licet singulae res non sint suae«.[13] It is an interpretative scheme of the connections between the legal-political dimension and territory that revises some of the prior statements[14] and destined to persist for a long time, even during the Modern Age.

Here, I would like to highlight the line of argumentation employed by Bartolus: in the same passage, he stresses that the position of power is recognised as the *ratione protectionis*;[15] in fact, the universal power of the Emperor has the character of a tutorial power.[16] In other words, it is a question concerned with power exercised in a conservative way, and it is not constitutive of space.

Bartolus confirms this point when he explains the formula by which *iurisdictio coaheret territorium*[17] makes it clear that the transfer of territory and of *iurisdictio* can follow independent paths; and in doing so, shows that different, coexisting and legitimate positions of power can be created in the same territory.

As for the private law scheme of *dominium divisum*, the relationship of power to territory is neither exclusive nor monistic. There is no need for it to be expressed in terms of a power that determines territory, or, put differently, it does not need to be territorialised to be exercised.[18] Rather than taking on the form of space, it takes the form of the society for which it cares precisely within a given space.

3 Possible space in the Modern Age

With the discovery of the Americas and the establishment of the reformed Christian confessions, the centuries of the Modern Era open up the horizon to a new presupposition of space,[19] in which the *Respublica Christiana* is no longer a point of departure. For those who want it, it is an objective to be achieved, a project to be completed.

For the first time, space is not given space; rather, it is proposed as a potential for the expansion of the legal dimension, a place into which the law could go before it was a place in which the law could be. In this way, for those who dealt with this novelty, space became understood in terms of a *possible* space.

The legal system of *ius commune*, through the dynamics of the autonomy of law,[20] had an immediate capacity for inclusion (and expansion) with respect to new phenomena. However, accord-

10 Marchetti (2001) 96–110.
11 Ruschi (2012) 93–104.
12 Costa (1969) 195.
13 Bartolus (1570) L. Post actiones, § Per hanc autem actionem, n. 2, tit. De rei vindicatione.
14 See Pace (1995) 37; Pennington (1993) 8–37.
15 Bartolus (1570), L. Omnem, n. 3 ff., tit. Prima Constitutio. See Costa (1969) 194–198.
16 Bartolus (1570), Rubrica, Tit. De iustitia et iure n. 1–2.
17 Bartolus (1570), L. Ius dicentis nn. 15–16, tit. De iurisdictione omnium iudicum. Cfr. Marchetti (2001) 88–94.
18 Hespanha (1983) 30–34.
19 On the relationship between geographic knowledge and colonial legal politics, see Benton (2010); Hespanha (2013).
20 For a conceptual definition, see chapter 2 about *potestas statuendi*.

ing to this new scenario, it is not enough to solve the problem tied to the relationship of territory to the legal dimension. In order to secure the long-term existence of the European legal order in possible space meant that new additional and/or alternative instruments were necessary. What is required is a fundamental re-thinking; a profound re-conceptualisation that, as we know, leads us to question the foundations of the legal system.

The Modern Age experimented with a number of different ideas and paths. In hindsight, the most famous and most emancipatory idea was natural law. I will return to this in a moment, because it seems to me that within the context of natural law, the problems concerning the spatial dimension within the context of law have shifted and taken on new contours: those of decided space.

In the, albeit, brief treatment that follows, I would like to sketch out the theoretical path of the Second Scholastic in possible space. In this regard, it should be noted that the modernisation of legal devices and categories during the Second Scholastic serves to recover; that is, it is a question of recovering the ordering value of the *Respublica Christiana* in situations that no longer exist (in Europe) or do not yet exist (in the Americas). Late Scholastic theologians are intimately familiar with the problem on both sides. Nonetheless, I think that the example of the Americas – as a context that is culturally and anthropologically extraneous to Christian culture – better highlights the challenge possible space represents for these theologians.

The solution proposed to modernise law is interwoven with a redefinition of the role of the jurist – this time flanked by the theologian. In fact, as Francisco de Vitoria explains, when *leges divinae* comes into play, the *sapiens* most capable of clarifying legal doubts and excercising legal doctrine in an immediate fashion is the theologian.[21] The autonomy of the law is not taken up at the expense of other forms of legal production, but is, as it were, kept alive with the support of theological elaboration that, if necessary, invades the field of legal hermeneutics. It is precisely this which permits the creation of the new instrument necessary for being able to work with the Christian *ius commune* in possible space. In particular, I am referring to the intuition of assigning legal titles at the individual level, that is, the development of legal protection devices referring to human beings as individuals regardless of his position in a society.

The theologians of Salamanca were probably the first to explore the potential of what we will refer to as the scope of individual natural rights. I have the impression that, in its initial expressions, this task was closely tied to the contemplation of law in possible space. In particular, I am thinking of two embryonic figures in the idea of individual rights: *ius peregrinandi* and *ius communicationis*.[22]

Travelling from place to place – moving in space – is seen as a natural inclination of human beings and a theologically founded natural right. Freedom of movement here is the basis of the constitutive moment of political societies. In fact, it is based on *ius communicationis*; namely, a right to relate and build social, economic, legal and political relationships. It is the basic instrument by means of which men, over time, give shape to the society in which they live. It indicates a natural sociality; one expressed immediately (and independently of political power) in historical facts.

Leaving aside the content of these individual rights, what we need to do and should be of primary interest to us is to reflect on the meaning of this construction. Let us ask ourselves, for instance, how these theologians were able to impart the fundamental character of unavailability to these rights. Here, the scheme of *ius commune*, which entrusts itself to the *autonomy of the law*, is insufficient. In fact, we find ourselves in a space that is no longer given, but rather is only possible – shared social practices are not based on a historical substratum sufficiently vast and stable enough to take on the importance of normative facts.

A new way was needed in order to guarantee and justify the unavailability of the right: there is a

21 De Vitoria (1538), pars I, sect. I, nn. 5–7, 9–11; De Soto (1582), Proemium n. 5. See Duve (2007) 189–193; Meccarelli (2009) 69–72.

22 De Vitoria (1538), especially Part I, sect. III, n. 2, 4–9; De Soto (1545); De Acosta (1596), lib. II, Cap. XII, XIII; De Las Casas (1553) 934–948; De Molina (1613), Tomus I, Tractatus II, disp. 105. On this topic see, among others, Tiessler-Marenda (2002); Nuzzo (2004); Cassi (2004); Panebianco (2005); Scuccimarra (2006); Tosi (2007); Lacchè (2009); Langella (2009) 25–37; Brett (2003), (2011); Meccarelli (2014).

need to resort to principles outside the legal dimension that are capable of justifying and configuring areas of legal protection, i. e., without the need for a society with a history and its normative facts as well as without the need for given space.

The unavailability of the rights is restored by means of an extra-legal basis permitting incorporation in individuals even before they are members of a society. It is this modern innovation that was destined to revolutionise the way legal protections are produced and that, hereafter, become graspable in the form of the protection of individual rights.

Here it seems to me that the most important novelty/innovation concerning the problem at hand is *incorporation*: the universality of the old legal order, whose complex geometry operated in given space, is now incorporated in the individual holder of rights. Consequently, this law (and with it the European legal order), following the spatial dislocation of individuals, is implemented in possible space.

Many things would change as a result of this approach to the problem, above all, within the field of private law. In fact, this line of thought is further developed and enriched in dealing with the »theological« definition of right. This was only made possible by making significant revisions to the instruments and devices within the field of intersubjective economic relationships and harboured significant effects for the theory of contracts and property.[23]

The situation is quite different, however, when it comes to public law, where several important new features, for instance, the doctrine of *ius belli* and an embrional notion of international order,[24] coexist with the traditional jurisdictional conception of power;[25] a conception crucial to the existence of a universal *Respublica Christiana*.

4 Decided space in the Modern and Contemporary Ages

Let us now ask whether this solution was sufficient with regard to the doctrinal trends, where the issue of defending the *Respublica Christiana* is not a programmatic aim.

In these different contexts, we find that the insight regarding individual rights is joined by another process;[26] one concerned with the constitutional conception of political power and its relationship to space. The process of which I speak brings to light a new idea of political power as State power.

Here the relationship between space and political power is re-conceived in terms of encouraging a territorialisation of power by means of overcoming *iurisdictio* and the adoption of a new and powerful ordering category,[27] namely, sovereignty. This category identifies the possibility of an original and absolute power, whose legitimation is not dependent on external factors. Traces of this notion are found in the work of Jean Bodin.[28]

Seen from this perspective, the use of sovereignty as a concept implies rewriting the relationship between political power and space in terms of its territorialisation, because sovereignty creates a necessary interdependence between political power and territory.[29] However, this is not a two-way street, for it is the process of affirmation and delimitation of political sovereignty that determine the territory in terms of the identification of external borders as well as its internal structure.

This leads us to discover a further idea connected to this assumed space; one that emerges at the dawn of the Modern Age and is still in full swing in the Contemporary Age,[30] namely, *decided space*, which is a manifestation of political power processes.

23 Grossi (1973); Clavero (1991); Duve (2007); Decock (2013); Prodi (2009).
24 Cassi (2009); Lacchè (2009).
25 Meccarelli (2009).
26 Stolleis (2008) 123–253; Esposito (2004) 41–77; Bobbio (1990) 57–61.
27 Costa (2013) 82–83; Costa (1999) 51–160; Fioravanti (2004) 51–61; Stolleis (2008) 194–215; Grossi (1998) (2001).
28 Bodin (1579), lib. I, chap. 8. As Benton (2010) 287–288 has pointed out, »his view was consistent with an early modern construction of sovereignty as spatially elastic«; therefore, he seems not yet to assume possible space. See also Grossi (1998).
29 Ruschi (2012) 2.
30 Sordi (2003) 353–355; Ruschi (2012) 282–298.

As I see it, the innovation of decided space emerges at the same time as the idea of sovereignty is being developed within a perspective Bodin had not yet fully taken into account: giving form to theories on the phenomenology of power and society without relying upon or appealing to history and its given spaces. Here, it is about formulating theories, *sicut mathematici*,[31] that are universal, thus hold for all of time and are applicable to any given circumstance, because they are able to separate the question of the foundation from the contingency of social facts.

I am thinking here specifically of the paths that thought concerning natural law has taken. The choice of the indeterminate territory (both spatially and chronologically) with regard to the state of nature as a basis for explaining how societies and political powers first come into being, means putting the process of manifestation of the power before that of the delimitation of territory, so that space is decided by sovereignty. In this primacy of political power, the other insight, concerning the possibility of incorporating space within the rights of the individual, finds other renewed possibilities for implementation.

A good example is provided by Thomas Hobbes, where, in fact, the construction of the social contract brings into play the absolute power of the sovereign:[32] in a process in which nature represents the moment of disorder and conflict, the political state is always a human and artificial construction understood as the »negative side«[33] of the state of nature. This implies the decidability of space. The scheme offers resistance and is reproduced within subsequent contexts.[34] And while Hobbes's approach is certainly outdated and has been relativised over the centuries, this does not, in my opinion, affect the dimension of assumed space.

Think of Jean Jacques Rousseau who reestablished the connection between society and political power by bringing the sovereign people centre stage.[35] Here, too, space is the result of the establishment of power; it becomes a *consequent factor* and not a conditioning assumption. Moreover, this means that individual rights are irrevocably tied to and the result of a political option.[36]

However, what we can say about the 18th century doctrines that continue to allow for a historical-natural dimension of space? The first thing that comes to mind is Montesquieu's idea of *esprit des lois* and its dependence on natural historical factors.[37] However, I also think of John Locke who recognised traces of individual fundamental rights in the ancient constitution of England; rights that were oriented and delimited the function of a State's political power.[38] Well, as I see it, all of these ideas are to be understood within and derived from the framework of decided space.

One might note that a given space is still operative here and serves as the parameter of external reference for developing the categories of the legal order. However, in hindsight, these statements *only* serve an *exemplifying* function. For Montesquieu,[39] it is a question of classifying the various possible forms of government and reducing them to a model; for Locke,[40] it is a question of seeing within the British tradition the historical implementation of an abstract model justified by natural law. In both cases, it comes down to explaining the pro-

31 For instance, Grotius (1625), in the *Prolegomena*: »Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinent pobationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat« [post medium]. »Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum« [ante finem].

32 Hobbes (1651), part I, chap. XIII–XIV; part II, chap. XVII; Costa (2013) 83–85; Neuenschwander Magalhães (2013) 227–228; Agamben (2015) 50–61.

33 Esposito (2004) 56.

34 Costa (2013) 84.

35 Rousseau (1762), lib. I, chap. VI–VII, lib. II, chap. I–II, lib. III, chap. XV; Fioravanti (2004) 54–55, (2009) 23–24, 71–77.

36 Rousseau (1762), lib. I, chap. VIII, lib. II, chapt. VI. See Meccarelli (2014) 73–74; Neuenschwander Magalhães (2013) 276–279.

37 Montesquieu (1864), Lib. I, 3–8.

38 Fioravanti (2004) 59–61.

39 Montesquieu (1864), Lib. II–III, 9–27. See Cavanna (2005) 117–135.

40 Locke (1698), book II; Fioravanti (2009) 24–27; Manti (2004) 191–221.

cesses of power and social organisation via conceivable categories and concepts *independent of history and its given spaces*.

When we look at the 19th century and consider doctrines attentive to the recovery of history and regional identities that, in light of these, reinterpret the Enlightenment concept of nation, the conclusion remains basically the same.[41] The fascination with and idea of ›people as a nation‹, which underlies programmes of political and civil engagement,[42] often refers to a space that should be given, but is not yet existent. In these cases, the decided space is presented as a space historically given and providentially ›identitary‹ in order to obtain a further and different form of legitimation. While there is a juridical project for the territory, within the context of given space, it is evoked merely as a premise of the argument and not as a fundamental presupposition for legal construction. This move demonstrates the underlying assumption of decided space, because the concepts are what define space and not vice versa.

Let us briefly reflect on the two main ideas that have been discussed up till this point: (1) a system of concepts that strengthens and stabilises a conception of private law focused on the individuals and their rights; (2) an ideal doctrine of the State capable of resolving the impass involving the self-contraint of sovereignty. Both of these are dogmatic constructions that view reality as an object of *subsumption* and history as a place of implementation. The given space is a mere argument resting on the assumption that space can and should be decided.

These dogmatic structures represent key points for the elaboration of legal theory in the multifaceted nationalist culture of the late 19th and 20th centuries. In spite of the nationalist discourse underlying very different intentions, periods and characteristics,[43] it nevertheless seems that spatiality remains a constant. The absoluteness of the property and the irrelevance of social-environmental factors in determining the legal cause of relationships between individuals, despite the complication of the changing historical and theoretical frameworks, remain two constants in contemporary private law.

For the 20th century conception of the State as a »form of life«, the notion of territory remains an essential element[44] corresponding to the »personality of the State«; »it is the body of the State«; »it is the State itself«.[45] And as Georg Jellinek emphasises, territory is necessary for the *Dasein* of the State; an idea, he also points out, that began circulating during the 19th century.[46] The Italian doctrine occupies the very same position.[47]

This aspect is strengthened at the level of international law and »accentuates the *real* nature of the State«:[48] it recognises the idea of political boundaries that delimit »a specific portion« of territory. Using the terminology of private law, they explicitly speak of a »*sachenrechtlichen Auffassung des Staatsgebiets im Völkerrecht*«.

Another prominent example is the colonial expansion in conjunction with the parabola of national States.[49] The colonial space assumed during the first half of the 20th century[50] is essentially understood as a projection of national sovereignty[51] and the related proprietary expectations. It is divided on the basis of legal categories presupposing the *decidability of space*. Several justifications can be provided (e. g., civilising mission, protec-

41 Costa (2013) 89; Habermas (2004) 147–151.

42 See, for instance, Cazzetta (2013).

43 Cappellini (2010) 163–177.

44 Kjellen (1917) 46–93. »Wir können das Land aus dem Staat nicht wegdenken ohne dass der Staatsbegriff sich verflüchtigt«; »Ohne Land gibt es gesellschaftliche Existenz, aber mehr auch nicht« [47–48]. See also Fischbach (1922) 76–79.

45 Kjellen (1917) 57.

46 Jellinek (1914) 395–396: »Die Notwendigkeit eines abgegrenzten Gebietes *für das Dasein* des Staates ist erst in neuester Zeit erkannt worden«. Jellinek claims that J. L. Klüber, Öffentliches Recht des teutschen Bundes, 1817, § 1, is the first to identify a necessary correspondence between State and territory. Hans Kelsen's doctrine is also moving in the same direction, as Lorente Sariñena (2010) 82 reminds us.

47 Sordi (2003) 370–371.

48 Fischbach (1922) 78–79: »Das Völkerrecht betont den sachenrechtlichen Charakter des Staates zu seinem Gebiet in fast allen Beziehungen. Hier ist das Staatsgebiet ein Stück der Erdoberfläche.«

49 Costa (2004/2005); Cazzetta (2004/2005); Nuzzo (2006), (2012); Martone (2008); Lorente Sariñena (2010) 217–234; Solla Sastre (2013); Augusti (2013).

50 In is not a coincidence that in the early 20th century a specificity in the process of colonization of the Contemporary Age is recognised over and against that of the Modern Age. See, for example, Hardy (1937), in particular 2–63.

51 As Hardy (1937) 452 explains: »ce qui semble dominer dans les origines de la colonisation contemporaine, ce sont les intentions proprement politiques. Pour chaque nation, la politique coloniale est désormais un élément, quelquefois le plus marquant, de sa politique extérieure.«

tion of economic interests, recognition of geopolitical weight or as the consequence of power relations), but at the heart of the 20th century colonial legal discourse, space does not appear to have been an independent variable of political decision (although, from a historical and anthropological view point, it very well could have been).

Of course, as I mentioned before, the situation is much more complicated. If we take in consideration the broader scale that comprises the European experience and its field of action overseas during the 19th century, we can identify other assumed form of space coexisting with decided space. For example, as part of the Hispanic experience, as a recent historiography shows,[52] we can appreciate, in relation to the constitutional changes, a certain resilience of the ancient jurisdictional network, which suggests the assumption of a *persistent space* in the legal culture.

But also within continental Europe, decided space seems to coexist with other forms of assumed space. If we return to the theme of private law stabilised by a dogmatic force, several variations in the juridical thought concerning labour- and business law come into view. These new branches of private law are the result of a conceptualisation process starting from the objective constraints of a space, the space of industrial relations; in other words, a given space, or, at least, one removed from the sphere of political decision-making and from matters involving the freedom of the individual. While the outcomes of this construction still speak the language of statute law, of rights and of the State, there is no denying that in the field of private law there have been trends towards overcoming the framework I have just described.[53]

Along the same lines, this picture becomes more complicated in the field of public law. I am referring, in particular, to the creation of constitutional States after World War II.[54] Constitutions are the outcome of a constituent power, and they entrust their fortunes to the political parties as instruments for the implementation of the democratic constitutional programme over the course of time. Politics still has a function within the legal spaces. However, it is precisely these constitutions that bring constitutional jurisdiction into consideration as a guarantee for the primacy of the constitution. In doing so, it turns the space of rights into a justiciable space (where justice, rather than freedom, is exercised). Yet, this seems more indicative of given space than decided space.

What form of assumed space informs our legal conceptions today? There are some important trends that lead us to think about the relationship of space and law in new terms, e. g., the law of the globalised economy, the digital dimension, the field of tension that has opened up between fundamental rights and cultural diversity,[55] or even between law and ethics.[56] Moreover, one thinks of new phenomena that cast the already mentioned constitutional and international jurisdictions in the role of producers of fundamental »rights«.[57]

At the same time, however, there are vast areas of decided space, above all, scenarios involving international crises,[58] like those related to migration, to the fight against terrorism, to humanitarian interventions, or even to the issue of redrafting State borders. Concerning these problems and issues, we are still very much caught up or operating in decided space.

We are living in a time of uncertainty and contradictions, where, as Jürgen Habermas has observed,[59] national States are losing their functions, on the one hand, yet gain spaces »for a new kind of political influence«, on the other. Consequently, the State is still an indispensable legal-institutional format of reference for our conceptual constructions around the problem of the law spatiality.

52 Garriga / Lorente Sariñena (2007); Lorente Sariñena (2010); Lorente Sariñena / Portillo Valdés (2012); Solla Sastre (2015).

53 Grossi (2000); Rückert (2004), (2005); Cazzetta (2007); Sabbioneti (2010); Hakim / Malleray (2009); Hakim (2013); Audren / Halperin (2013); Rückert (2014).

54 Fioravanti (2004), (2009).

55 Duve (2014a); Neuenschwander Magalhães (2014); Stara (2014); Lembke (2012); Stortoni / Tordini Cagli (2012).

56 Esposito (2004); Habermas (2001); Viola (2000), (1996); Agamben (1995), (1996).

57 Di Giovine (2013); Meccarelli / Palchetti / Sotis (2014).

58 See, among others, the essays collected and the bibliography quoted in Meccarelli / Palchetti / Sotis (2011), (2012), (2014).

59 Habermas (2007) 177, with reference to Zürn (2001).

Perhaps we can say that what we assume today is an *impermanence* of the space; however, this is only an interim response and, without the development of many other insights that I cannot develop here, are probably inadequate to the task.

5 Conclusion

This final thought brings me back to the initial aim of this contribution. Originally, I only wanted to provide a few examples regarding the importance of the space/law relationship for legal historical investigation and then evaluate the method. In order to make up for lost time, I will leave all pending questions unresolved, and, instead, devote my concluding reflections to the methodological profile.

As I said at the beginning of the article, I believe that grasping space as a constituent key, in addition to a merely reconstructive key, accentuates the analytical capacity in legal historical investigation. In fact, it enables us to take up a point of view attentive to the *constraints involved in the theoretical sustainability of concepts*; in other words, a perspective mindful of the profiles of presupposition underlying the conceptualisation of ideas. In this way, as well as acting as a critical consideration for the performativity of concepts, legal history is able to take into account the processes that shape them. Instead of a history about the emergence of ideas, it becomes a history of their originary boarders and limits.

Space is, therefore, a key consideration for problematising the foundations of references and reorienting our analytical approach.[60] And there are others that can also be taken into account such as justice. When it comes to the history of rights, to continue with our example, the creation of tension in the relationship between the dimensions of law and justice allows us to see a more complex phenomenology of legal protection.[61] Thus, we are talking about a historiographical approach comprised of multiple facets. It seems to me that this approach, let's call it the »history of limits«, can add something to the advancement of knowledge within our discipline.

From the viewpoint of historicising experiences – a perspective that discloses a »›pluralistic‹ perspective of sense«, where modern concepts can be re-aligned thereby gain »historical concreteness«[62] – the analysis of the strictly legal phenomenon is more closely tied to specific contexts (e. g., the social, political, economic, anthropological, geographical, etc.). In fact, these are not only considered external factors helping us to understand legal figures within the context of a history of limits approach, but they are also considered part of the hermeneutic elaboration of those legal figures.

A historiography capable of analysing the constraints of the theoretical sustainability of concepts would also be useful when interacting with other legal sciences. Often, attention is drawn to the need for a dialogue between legal history and other legal sciences, and within this field of study, several significant outcomes have been witnessed. Let us briefly think about the expectations others fields of legal knowledge might have when considering the legal-historical perspective. It is conceivable that they would be attracted by our capacity for deconstructive analysis.[63] Demythologising legal categories makes it possible to better grasp the current problems experienced within the post-modern legal system. Upon closer examination, however, the current post-modern critical perspective has gained ground in many fields of legal science. We, as legal-historians, are not the only ones to adopt a critical deconstructive approach, and our analyses, which expose legal mythologies, are increasingly intertwined with other areas of legal research.

Within this framework, the current interdisciplinary dialogue asks something more of us; it asks for us to involve ourselves in the realisation of these constructive tasks. Are we methodologically equipped to take up this challange? Must we follow the call issued by interdisciplinary dialogue and pursue this area of research? It seems to me that by placing ourselves within the perspective of the history of limits – a hermeneutic process that exposes legal figures in their relation to unreflected aspects of legal perception – might also enable us interact on a constructive level, without sacrificing our specific and necessarily desconstructive perspective.

60 See, for example, Duve (2014b); Meccarelli/Palchetti (2015).
61 Meccarelli (2014).
62 Cappellini (2010) 8.
63 Hespanha (2012) 13–83; Stolleis (2012); Garriga (2010); Fonseca (2009); Grossi (2005), (2006); Costa (1989); Clavero (1986).

Thinking of space from a juridical point of view also provides us with an opportunity to rethink the space of legal history today. I do not know to what extent this territory is distensible or where our *hic sunt leones* is to be found. Nonetheless, it is for this reason that I believe we must constantly renew the question concerning figures, their role in legal history as well as the role of legal history itself. Indeed, for a discipline such as ours, characterised by an open epistemology, a question like this serves not only as an opportunity for reflection and reevaluation, but also acts as a guiding star.

■

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